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ABSTRACT

In the landmark "Gertz" decision, the United States Supreme Court held that, in the interest of protecting libel plaintiffs, the states under certain conditions could define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods. This paper explores several applications of the "Gertz" decision, by various states, in the two years since the opinion was handed down (23 states have cited "Gertz"). The paper concludes that the full impact of "Gertz" will not be known until state courts have had more opportunity to fully interpret the "Gertz" standards in light of the traditional common-law principles of defamation. (JM)

THE IMPACT OF GERTZ: HOW THE STATES HAVE DEFINED THE STANDARD OF LIABILITY FOR THE PRIVATE LIBEL PLAINTIFF

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THE IMPACT OF GERTZ: HOW THE STATES HAVE DEFINED THE STANDARD OF LIABILITY FOR THE PRIVATE LIBEL PLAINTIFF

The U.S. Supreme Court's decision in Gertz v. Robert Welch, Inc.,[1] announced June 25, 1974, has brought significant changes in the evolving law of libel, particularly in the protection afforded to newsmen by the generally expanding constitutional privilege first announced a decade earlier in New York Times Co. v. Sullivan.[2] The Gertz decision has also greatly modified application of the various common law defenses traditionally available to a publisher or broadcaster of defamatory falsehoods injurious to a private individual. Indeed, one libel authority, Don H. Reuben, general counsel for the Chicago Tribune, views Gertz as threatening "to turn the law of libel on its end."[3] The avowed purpose, however, of at least one justice joining the majority in Gertz--without whom the new libel standards would have been impossible--was to eliminate the unsureness engendered by the Rosenbloom diversity of opinions and bring certainty once again to the law of libel.[4] Has Gertz brought certainty or uncertainty to the law of libel? Perhaps the place to begin an inquiry into the impact of Gertz is with the opinion itself.

The Gertz Decision

Elmer Gertz, a well-known Chicago attorney, brought a diversity libel action in the U.S. District Court, Northern District of Illinois, against Robert Welch, Inc., publisher of American

Opinion, a John Birch Society magazine. The magazine had published an article falsely accusing Gertz of being the architect of a "frame-up" against a police officer, implying that Gertz had a criminal record, and identifying the attorney as a "Leninist," a "Communist-fronter," and a former official of a Marxist organization. Gertz' involvement as the legal counsel in civil litigation brought against a Chicago policeman by the family of a youth whom the officer shot and killed prompted the magazine article. The policeman had been prosecuted by Illinois authorities for homicide and was utlimately convicted of second degree murder, but Gertz was not directly involved in the criminal prosecution. The District Court jury awarded Gertz $50,000 in the libel action, but the district judge, deciding that the article dealt with a public issue and that the knowing or reckless falsehood rule therefore applied, entered judgment for the magazine. The U.S. Court of Appeals, Seventh Circuit, affirmed and Gertz appealed.

The U.S. Supreme Court, while noting that the "First Amendment requires that we protect some falsehood in order to protect speech that matters,"[5] was reluctant to apply the New York Times constitutional standard to a non-public libel plaintiff. In reversing by a 5 to 4 vote, the Court said that "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain."[6] The "public or general interest" standard announced by the plurality in Rosenbloom v. Metromedia, Inc.,[7] which had been adopted by many state courts during the three-year period prior to Gertz, was inadequate, the Court said, in balancing the competing values at stake.[8]

Private individuals, being more vulnerable to injury than are public officials and public figures, are more deserving of recovery, the Court said, even when such a publication concerns matters of "public or general interest." Addressing the state interest in protecting such private libel plaintiffs, the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for publisher or broadcaster of defamatory falsehood injurious to a private individual."[9] But the state interest in protecting the non-public libel plaintiff extends no further than compensation for actual injury. Where presumed or punitive damages are sought, liability is to be based upon the constitutional privilege requiring a showing of knowledge of falsity or reckless disregard for the truth, the same constitutional standard as that applied to public officials and public figures.[10]

Applying the Gertz Standard

How have the states defined "for themselves" the appropriate standard of liability under the Gertz mandate? A pursuit of this question is the subject of this paper. In the reported cases, and such reports are limited largely to the state appellate courts and the federal courts expressly applying state law, Gertz has been cited by the courts in at least 23 states during the past 21 months. As might be expected under such a broad mandate, the standard of liability applied tends to vary from state to state. In at least two states--Colorado and Indiana--the Rosenbloom plurality opinion has been adopted despite the Gertz holding

which, in effect, reversed Rosenbloom. In at least one state--Massachusetts--punitive damages in libel actions have been ruled out entirely. The state courts have grappled with other questions. Does Gertz apply to non-media defendants? Does Gertz apply to "purely private publications"? These questions will be considered here; however the Gertz Court's efforts to distinguish between public figures and private libel plaintiffs are beyond the scope of this paper. The public figure question, however, is clearly a problem with which future courts will have to deal, as they are beginning to do in Time, Inc. v. Firestone.[11]

The many alternatives which the Gertz opinion apparently has left open to the states has, in itself, created problems in applying the new private libel standards. The Court of Special Appeals of Maryland, for example, saw three paths which could be followed in adopting the Gertz standards:

> (1) they applied to all defamations; (2) they applied only to defamations involving matters of public or general interest, thus excluding purely private defamations; and (3) they applied only to defamation in which the media were the means of the defamatory injury.[12]

The Maryland court avoided the first path because it felt it was not constitutionally required and since such a route would mean scuttling much of the prevailing defamation law of Maryland in matters which were of no concern to First Amendment guarantees. The Maryland court also rejected the third path, accepting the second alternative with certain provisos, holding that:

> A purely private defamation--when a private individual is injured by a defamatory falsehood which is not a matter of public or general interest--is not within the ambit of the First Amendment and the relevant State law prevails, the Gertz holdings not being impressed thereon.[13]

Other states, as discussed below, have, in some instances, applied these alternatives somewhat differently.

While the states may not impose liability without fault, according to the Gertz holding, the states were left free to establish liability "under a less demanding standard" than that stated by the New York Times rule. The Gertz Court left little doubt, however, that the proper standard of liability should be negligence. At one point the Court stated:

> Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential.[14]

In prohibiting punitive damages, the Court said that such "damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions."[15] Justice Blackmun, concurring, emphasized that "the Court now conditions a libel action by a private person upon a showing of negligence."[16] Chief Justice Burger, dissenting, characterized the majority opinion as introducing to defamation law the concept of "negligence."[17] Justice Brennan referred to "a reasonable-care standard,"[18] and Justice White's dissent contained similar language.[19] Despite all these references to negligence, however, the states were left free to adopt a stricter standard of liability for the private libel plaintiff, and at least two states have done so.

Two States Adopt Rosenbloom

The Court of Appeals of Indiana in December of 1974, six months after the Gertz opinion was announced, rejected the simple negligence standard in Aafco Heating and Air Conditioning Co. v.

Northwest Publications, Inc.,[20] in favor of "a qualified constitutional privilege." In adopting the New York Times standard, as applied to private libel plaintiffs by Rosenbloom, the Indiana court first found that matters of general or public concern were protected by Article 1, Section 9 of the Indiana Constitution. But the decision was not based solely upon state constitutional grounds. The court states:

> [W]e assume that factual error is inevitable in the course of free debate and that some latitude for untrue or misleading expression must be accorded to the communications media; otherwise, free, robust debate worthy of constitutional protection would be deterred and self-censorship would be imposed in the face of unpopular controversy.[21]

The court, in affirming summary judgment for the Gary Post Tribune, concluded that drawing a distinction between public and private figures "makes no sense in terms of our constitutional guarantees of free speech and press."[22]

The Supreme Court of Colorado in March, 1975, while affirming a libel judgment against a media defendant in Walker v. Colorado Springs Sun, Inc.,[23] rejected arguments by a private libel plaintiff that the court should adopt the Gertz negligence standard. The court said:

> We hold that, when a defamatory statement has been published concerning one who is not a public official or public figure, but the matter involved is of public or general concern, the publisher of the statement will be liable to the person defamed if, and only if, he knew the statement to be false or made the statement with reckless disregard for whether it was true or not.[24]

The court noted, however, that the consensus of the majority was that the St. Amant definition of reckless disregard, "that the defendant, in fact entertained serious doubts as to the truth of his publication"--a definition adopted by the Rosenbloom

Court--should not be approved "at this time" since the term reckless disregard "had rather frequent usage in the tort field" in Colorado. While the majority opinion rested essentially upon the premise that abandonment of the New York Times standard would have an adverse effect on freedom of expression, it should be noted that a two-judge minority took the view that the standard for liability should be that of ordinary negligence.

Illinois and New York Standards

Both Aafco and Walker, discussed above, have been used as persuasive authority by media defendants in other states, but apparently with little success. The Illinois Supreme Court in November of 1975, for example, rejected arguments by the Chicago Sun Times relying partially upon the Indiana and Colorado decisions. The full application of the Gertz holding had been slow in coming in Illinois, the state which had spawned this landmark decision. At least five intervening libel cases, four which cited Gertz and the fifth which should have but did not, were dealt with by the Illinois appellate courts during the eighteen months following Gertz before a case presenting the appropriate questions reached the Illinois Supreme Court. That case, Troman v. Wood,[25] involved an investigative story in the Chicago Sun Times relating to a series of burglaries and other criminal activities by a gang of youths operating on Chicago's northwest side. In reversing summary judgment for the newspaper, the Illinois Supreme Court, citing Gertz, held that in a libel action brought by a private individual for actual damages "negligence may form the basis of liability regardless of whether or not the publication in question

related to a matter of public or general interest." However, the court noted that

> under a standard of ordinary negligence, the question would be, not whether the defendant entertained doubts of the truth of his statement, but rather whether he had reasonable grounds to believe it to be true, and a failure to make a reasonable investigation into the truth of the statement is obviously a relevant factor.[26]

The court added that the decision was not "intended to remove any of the absolute or qualified privileges which have heretofore been recognized in this State to the extent that the facts warrant their application."[27] The court did not elaborate upon the occasion for the use of such common law defenses.

In adopting the negligence rather than the actual malice standard, the court rejected a series of arguments by the newspaper, including: (1) that even though the federal constitution did not require Illinois to apply the New York Times standard, freedom of the press required it, (2) that a private individual's right to recover damages for publications which do not relate to matters of public interest should be limited, or (3) that in lieu of ordinary negligence, liability should be limited to instances of either gross negligence or willful and wanton misconduct, or even to instances of "journalistic malpractice." The Troman decision, despite its limitations on press freedoms, may help to clarify the state of limbo into which the libel law in Illinois had fallen. In one appellate opinion, for example, Gertz was cited as requiring the private plaintiff to "prove he suffered some actual damage and that the defendant published the article knowing it was false or in reckless disregard of whether it was false."[28] This is clearly a misreading of Gertz. In another

appellate decision, this one coming fourteen months after Gertz, the court disregarded the U.S. Supreme Court's mandate against strict liability, holding that it is "well-settled in Illinois that there are certain classes of words that are actionable per se, that is, without a showing of special damages."[29]

Application of the Gertz standards was slow in coming in another populous state--New York. One New York trial judge, for example, while noting that he was much impressed by a private libel plaintiff's argument based upon the reasoning of Gertz, expressed doubts concerning review of a decision based upon such a holding upon appeal. The judge wrote:

> We cannot anticipate whether the Court of Appeals will abandon the Rosenbloom doctrine, or, if it should, what standard of care it might adopt. Therefore, we are bound to adhere to the Rosenbloom rule as adopted by the Court of Appeals.[30]

It was a year later before the New York Court of Appeals, the state's high court, applied Gertz in a way which placed the standard of fault which must be proved by the private libel plaintiff somewhere between the position taken by Indiana and Colorado, on the one hand, and Illinois on the other. In Chapadeau v. Utica Observer-Dispatch, Inc.,[31] the New York court, while limiting the Gertz standards to "the sphere of legitimate public concern," in contrast to Illinois where the standards were applied to all publications, held that the party defamed, to recover

> must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarly followed by responsible parties.[32]

It is apparent from the application of the new standard in the instant case that the culpability of a news medium in New York will be more difficult to prove than in Illinois. The Utica Observer-Dispatch had erroneously reported that the plaintiff, a public school teacher, was arrested along with two other men on drug charges following a party with a group in a park. The trial court denied summary judgment for the newspaper, but the New York Supreme Court, Appellate Division, had reversed. The New York Court of Appeals, however, in affirming the reversal, held that the failure of the state desk reporter and copy reader to catch the error was insufficient to preclude summary judgment. The court said:

> The instant article was written only after two authoritative sources had been consulted and it was not published until it had been checked by at least two persons other than the writer. This is hardly indicative of gross irresponsibility. Rather it appears that the publisher exercised reasonable methods to insure accuracy.[33]

Other Negligence Standards

Clearly the gross negligence standard of New York provides more protection for the media defendant than the ordinary negligence standard adopted in Illinois. Without doubt the actual malice test, as defined in New York Times Co. v. Sullivan and as adopted as the standard for private libel plaintiffs in Indiana and Colorado, also provides more protection for the media defendant than either the New York or Illinois standards. But the Gertz options as to degree of fault under the constitutional privilege are not limited to these three standards. The Supreme Court of Kansas, for example, has adopted a "reasonable care standard" in finding the Dodge City Daily Globe guilty of negligence, noting

that "persons are generally held accountable for their negligence--the lack of ordinary care either in the doing of an act or in the failure to do something." The whole theory of negligence, the court said, presupposes some uniform standard of behavior for the protection of others from harm. The court noted that the "norm usually is the conduct of the reasonable careful person under the circumstances."[34]

It clearly takes more to prove fault under the Gertz standards, however, than merely printing a falsehood. The Louisiana Court of Appeals, for example, held that failure of the Baton Rouge, La., Morning Advocate to verify information in a press release from the public relations director of the police department by checking the arrest records in the various parishes did not constitute negligence. The court said:

> [W]e do not think that the paper was under any duty to so verify the information in this case. Ann McCoy [the police public relations director] was a proper and authorized source of information concerning the drug raid.[35]

The Court of Appeals of Ohio enunciated a "due care" standard in holding that summary judgment for the Cleveland Press was in error where the newspaper ran a story reporting that the plaintiff, hired to demolish a building had, through some mistake, demolished the wrong building and erroneously reported that the plaintiff had told the trial judge, in explaining how it happened, "I guess we got carried away."[36] The court held that

> a private individual bringing a libel suit based upon publication which is defamatory on its face must prove not only the publication of such statement but also actual injury and fault on the part of the publisher. Such fault may consist of either negligent failure to exercise due care, or a degree of fault such as express or actual malice.[37]

The Court of Appeals of Maryland, on the other hand, has adopted a standard of negligence as set out in the Restatement of Torts,[38] making publication of "a purely private matter" about either a public official, public figure, or private individual subject to liability if the publisher:

> (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (3) acts negligently in failing to ascertain them.

The court noted in Jacron Sales Co., Inc. v. Sindorf[39] that under these standards truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff since he is required to establish negligence with respect to such false publications.

The "Uncertainty" of Firestone

In no post-Gertz case is application of the new fault standard any more confusing than in litigation involving the divorce of Mary Alice Firestone in Florida.[40] The Florida Supreme Court, in reviewing the libel action against Time magazine resulting from a report on the outcome of the divorce case, held that before erroneous reporting abuses the constitutional privilege there must be "clear and convincing evidence of negligence" by the news media in gathering the news.[41] But what constitutes "clear and convincing evidence," and who determines such negligence? The Florida Supreme Court reasoned that Time magazine's "Milestones" paragraph, which reported grounds for Mrs. Firestone's divorce as adultery, was sufficient proof of fault since the judgment had also awarded alimony which Florida law forbade on such grounds. The court stated:

> A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of 'journalistic negligence.'[42]

The U.S. Supreme Court, per Justice Rehnquist, remanded the case, which had awarded $100,000 to Mrs. Firestone, back to the Florida courts, holding that there was no evidence of fault presented to the jury in the case, nor was there a finding of fault at any level of the state court system as required by Gertz.[43] Justice Brennan, dissenting, also found the rationale of the Florida Supreme Court regarding fault on the part of Time as setting an impossible standard. Pointing to the problem of assuring against such errors in judicial proceedings, Justice Brennan noted that

> the same Florida Supreme Court, in reviewing the judgment of divorce some two and one-half years previous to the above quoted statement, had found the divorce to have been granted by the trial judge on the erroneous grounds of 'lack of domestication' rather than for either extreme cruelty or adultery.[44]

Justice Marshall, dissenting, also chided the Florida Supreme Court on its error, noting that "courts occasionally err in their assessment of the law."[45]

It is clear from examining the above cases in which the Gertz fault standard has been expressly applied that not one but several standards emerge. One libel attorney who served as counsel for Gertz sees no real problem with this approach. Instead of proving malice, the private libel plaintiff must now prove fault on the part of the media defendant. Libels, to be recoverable, in effect, must fall into the categories which were previously considered to be libel per se, but the rules of libel per quod will

be applied in determining liability, he pointed out. Establishing proof of fault, whatever degree the state may establish, should be no problem for the courts since they will be following traditional and familiar tort principles:

> The kinds of factors to be considered will be such things as, what was the source of the information, did the defendant make any attempt to verify the information, and what kind of effort, and did the defendant continue to repeat the statements after receiving notice that the statements were false.[46]

From the examination of the cases above, however, there is some indication that Gertz may be more of a problem than Gertz' former counsel has indicated.

The Limits of Gertz

Does the Gertz fault standard, however it is interpreted by the state courts, apply only to private persons involved in matters of public or general interest, or does the standard apply to any publication, even one involving purely private facts? Most of the cases citing Gertz deal with public matters and the opinions are understandably silent on this question. The Maryland Court of Appeals, however, has expressly stated that such a private publication would not be within the ambit of the First Amendment, that under such circumstances the common law would prevail.[47] The New York Court of Appeals has also explicitly limited the constitutional privilege to "the sphere of legitimate public concern which is reasonably related to matters warranting public exposition."[48] The Indiana Court of Appeals, in choosing to retain the New York Times standard for private libel plaintiffs, was clearly dealing with a publication and a state constitutional provision involving "matters which are of general or public

concern."[49] So was the Colorado Supreme Court expressly dealing with public matters in Walker v. Colorado Springs Sun, Inc.[50] The Wisconsin Supreme Court, citing Gertz, ruled that the constitutional libel privilege of the New York Times did not apply in a case involving an accountant who sued his former employer for defamatory statements in letters of references sought by potential employers. In such cases, the court said, "express or common law malice" standards are involved.[51] The Illinois Supreme Court, however, specifically noted in adopting Gertz that "negligence may form the basis of liability regardless of whether or not the publication in question related to a matter of public or general interest."[52] The case was the only media-defendant case examined citing Gertz in which the negligence standard was expressly extended beyond the scope of the Rosenbloom opinion.

Does the Gertz standard apply to non-media defendants as well as media defendants? In most of the citing cases the defendants were media litigants, therefore the question was not raised. In cases involving non-media defendants the decision was more likely to be based upon a finding that the publication itself fell outside the "protective umbrella of the First Amendment" rather than that the non-media defendant was not covered by the constitutional privilege. The California Court of Appeals, for example, found that a credit report, as opposed to news media publications, were "unmistakably" outside the protection of the First Amendment freedom dealtwith in Gertz.[53] The Maryland Court of Appeals, however, would go further. Not only did the court adopt the Gertz negligence standard in cases "of purely private defamation," but the opinion expressly stated that

the Gertz negligence standard applied to cases of "libel and slander alike brought against non-media defendants." Adoption of such a standard, even in cases of purely private defamation, "hardly introduces a radical concept to tort law," the court concluded.[54]

Other Gertz Applications

The states have been more consistent in applying the Gertz "actual malice" standard for the award of presumed and punitive damages to private libel plaintiffs. One exception was in Massachusetts where the Supreme Judicial Court rejected outright any allowance of punitive damages in any defamation action on any state of proof. The court said:

> We so hold in recognition that the possibility of excessive and unbridled jury verdicts grounded on punitive assessments, may impermissibly chill the exercise of First Amendment rights by promoting apprehensive self-censorship.[55]

It is interesting to note that two of the dissenters in Rosenbloom, Justices Marshall and Stewart, would also have barred punitive damages in all libel cases.[56] In regard to actual damages, however, the Massachusetts court agreed with Gertz that "private persons, as distinguished from public officials and public figures" should recover compensation on proof of negligent publication of a defamatory falsehood.

In at least one state the court had an easier decision in regard to adopting the Gertz standard. The Supreme Court of Hawaii noted that the state courts had never applied the Rosenbloom standard to private individuals, therefore the negligence standard which had been expressly applied in a 1970 Hawaiian case, Aku v. Lewis,[57] still stood. After reviewing Gertz and considering

the Aafco and Walker cases in which Indiana and Colorado had decided to continue with the Rosenbloom standard, the Hawaii Supreme Court refrained from departing from the negligence standard established in Aku.[58]

The Supreme Court of Idaho, reviewing a privacy action against a television station which had telecast a segment of film showing a man who had been arrested being taken from his home in the nude, carefully avoided the Gertz issue by holding that "news media are immune from liability for reporting the details of an arrest, even though such an arrest may disclose embarrassing private facts, unless it can be shown that the disclosure was made with malice." Citing Gertz, the court noted that "the rule which is announced today follows the First Amendment standard set down by the Supreme Court.[59]

Other jurisdictions have also cited Gertz, including Alabama, the District of Columbia, Montana, Texas, Virginia, Washington, and West Virginia,[60] but the opinions are generally silent on how the standards will be applied. The Supreme Court of Alabama, for instance, in reversing the trial court's dismissal of a libel action involving two "eminent former professors of English" at the University of Alabama, noted:

> We have fully considered Gertz . . ., destined to be an important factor in many future decisions in cases of defamation, and find that our decision herein is not in conflict with what was held within.[61]

This may be a tacit recognition of Gertz, but the opinion fails to show how the fault standard was to be applied, if at all.

Summary and Conclusions

Dean Prosser's confession in the opening chapter on defamation

in his treatise on torts that "there is a great deal of the law of defamation which makes no sense"[62] should remain unchallenged after the Gertz revisions. Justice Blackmun, who joined the Gertz majority in an effort to erase what he viewed as the "uncertainty" which had surrounded the "sadly fractionated" Rosenbloom Court,[63] might well have accomplished his purpose better by adhering to his prior position in favor of extending the New York Times standard, even to private individuals so long as the publication involved matters of public or general interest. There is little indication that Gertz is likely to produce more certainty than Rosenbloom. It is clear in examining the cases above that the already complex body of libel law is being made even more complex by imposing upon it one more special category--that of the private libel plaintiff. It is clear also that the Gertz standards prevent a return to the post-Rosenbloom approach in dealing with the private libel plaintiff, both because of the ban placed on strict liability and because of the differing degrees of fault required for actual damages as distinguished from punitive damages. The Court of Appeals of Maryland, arguing that the Gertz holding should apply to non-media defendants and to slander as well as to public libel in the interest of consistency and simplicity in applying the law, noted that to do otherwise--and most states have done otherwise--would require at least three different categories in libel actions: (1) public officials and public figures would be required to meet the New York Times standard, (2) private plaintiffs would have to show fault--presumably negligence--to receive actual damages and "actual malice" under the New York Times standard to receive presumed or punitive damages,

if the publication dealt with a matter of general or public concern, and (3) private libels, no matter what category the plaintiffs might fall into, would continue to be dealt with under the established common law principles as developed in the various states.

The Gertz standards add to the complexity of the law of libel, however, not only because they establish a new category for the private plaintiff, but because the decision also modifies aspects of the other two categories. The decision certainly modifies the definition of public figure, one of the categories of plaintiffs coming under the New York Times standard. The decision also modifies the private libel category to the extent that the ban on strict liability is applied to such libels. While the appeal for consistency and simplicity in the law of defamation made by both the Maryland and Illinois courts may be appealing, the Gertz opinion clearly emphasized that the holding was being applied to publishers and broadcasters--media defendants. Even if Gertz is read to include non-media defendants as well, will the states be willing to apply the Gertz fault standard--however that term is defined in a given state--to a publication which is not of public or general concern? A few courts have already pointed out that such a publication is not appropriate for First Amendment protection. But if private libels, those falling under category 3 above, are outside the scope of Gertz, then is the ban on presumed damages also inapplicable?

On the basis of the cases examined above, these questions cannot be answered with any precision at this time. While a

majority of the states which have dealt with Gertz to date have adopted some type of negligence standard, at least two states--Indiana and Colorado--have clung to the New York Times actual malice standard. The negligence standards adopted, however, range from gross negligence to ordinary negligence and apply a variety of tests, including "clear and convincing evidence" (Florida), "reasonable grounds" to believe in the truth (Illinois), "conduct of the reasonable careful person under the circumstances" (Kansas), "negligent failure to exercise due care" (Ohio), and "a preponderance of evidence" (New York).

The majority of the states applying Gertz to date have assumed that the negligence standard applies only to litigation involving media defendants or at least to publications which are matters of general or public interest, but two states--Illinois and Maryland--would include purely private defamation as well in the interest of consistency and simplicity in applying libel law. Most states citing Gertz have applied the New York Times actual malice standard to presumed and punitive damages, but Massachusetts has gone a step further, banning punitive damages entirely. Such distinctions being made by the state courts are a reflection, perhaps, of the growing impact of Gertz, a decision which indeed threatens "to turn the law of libel on its end."

The full impact of Gertz, however, will not be known until the state courts have had more opportunity to fully interpret the Gertz standards in light of the traditional common law principles of defamation. Such a determination in all the 50 states is likely to take many years. Meantime fears continue to be expressed that Gertz may lead to "apprehensive self-censorship" by

the news media. Perhaps a recent law review commentary suggests a better approach to the Gertz problem: rather than practicing self-censorship, publishers and broadcasters should practice better journalism.[64]

Footnotes

[1]418 U.S. 323 (1974).

[2]376 U.S. 254 (1964).

[3]"Seminar on Libel and Privacy," Illinois State University, Normal, Illinois, May 2, 1975.

[4]Id. at 354 (Justice Blackmun concurring).

[5]418 U.S. at 341.

[6]Id. at 343.

[7]403 U.S. 29 (1971).

[8]418 U.S. at 343.

[9]Id. at 347.

[10]Id. at 349.

[11]44 U.S.L.W. 4262 (March 2, 1976).

[12]General Motors Corp. v. Piskor, 340 A.2d 767, 773 (Md. 1975).

[13]Id. at 773.

[14]418 U.S. at 348.

[15]Id. at 350.

[16]Id. at 353.

[17]Id. at 355.

[18]Id. at 366.

[19]Id. at 375-76.

[20]321 N.E.2d 580 (Ind. 1974), cert. denied, 44 U.S.L.W. 3467 (Feb. 24, 1976).

[21]Id. at 586.

[22]Id. at 587.

[23]538 P.2d 450 (Colo. 1975).

[24]Id. at 457.

[25]340 N.E.2d 292 (Ill. 1975).

[26]Id. at 298.

[27]Id. at 299.

[28]Doss v. Field Enterprises, Inc., 332 N.E.2d 497, 499 (Ill. App. 1975).

[29]Weber v. Woods, 334 N.E.2d 857, 861 (Ill. App. 1975).

[30]Safarets, Inc. v. Gannett Co., Inc., 361 N.Y.S.2d 276, 280 (S.Ct. 1974).

[31]341 N.E.2d 569 (N.Y. 1975).

[32]Id. at 571.

[33]Id. at 571-72.

[34]Gobin v. Globe Publishing Co., 531 P.2d 76, 83 (Kan. 1975).

[35]Wilson v. Capital City Press, 315 So.2d 393 (La. App. 1975).

[36]Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co., 334 N.E.2d 494, 496 (Ohio App. 1974).

[37]Id. at 498.

[38]Restatement of Torts, Sec. 580B (Tent. Draft No. 21, 1975).

[39]350 A.2d 688, 697-98 (Md. 1976).

[40]Firestone v. Time, Inc., 305 So.2d 172 (Fla. 1974), vacated and remanded, 44 U.S.L.W. 4266 (March 2, 1976).

[41]305 So.2d at 178.

[42]Id. at 178.

[43]44 U.S.L.W. at 4267.

[44]Id., note, at 4272.

[45]Id. at 4275.

[46]Giampietro, "The Constitutional Rules of Defamation, Or It's Libel But Is He Liable?" 10 Illinois Bar Journal 15 (September 1975).

[47]General Motors Corp. v. Piskor, 340 A.2d at 773.

[48]Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d at 571.

[49]Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d at 585.

[50]538 P.2d at 457.

[51]Calero v. Del Chemical Corp., 228 N.W.2d 737, 748 (Wis. 1975).

[52]Troman v. Wood, 340 N.E.2d at 299.

[53]Roemer v. Retail Credit Co., 119 Cal. Rptr. 82, 85 (Cal. App. 1975).

[54]Jacron Sales Co., Inc. v. Sindorf, 350 A.2d at 696-97.

[55]Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 169 (Mass. 1975).

[56]403 U.S. at 84-85.

[57]477 P.2d 162 (Haw. 1970).

[58]Cahill v. Hawaiian Paradise Park Corp., 543 P.2d 1356, 1366 (Haw. 1975).

[59]Taylor v. KTVB, Inc., 525 P.2d 984, 988 (Idaho 1974).

[60]Bowling v. Pow, 301 So.2d 55 (Ala. 1974); Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975); Gilham v. Burlington Northern, Inc., 514 F.2d 660 (9th Cir. 1975); Vandenburg v. Newsweek, Inc., 507 F.2d 1024 (5th Cir. 1975); Tweedy v. J. C. Penney Co., Inc., 221 S.E.2d 152 (Va. 1976); and Exner v. American Medical Association, 529 P.2d 863 (Wash. App. 1974).

[61]Bowling v. Pow, 301 So.2d at 64.

[62]W. Prosser, Handbook on the Law of Torts 737 (4th ed. 1971).

[63]418 U.S. at 354.

[64]Comments, "Constitutional Law--Reformulation of the Constitutional Privilege to Defame," 24 Kansas Law Review 419 (Winter 1976).